Denver Law Review

Volume 15 | Issue 10 Article 5

July 2021

Supreme Court Decisions

Dicta Editorial Board

Supreme Court Decisions

DIVORCE—SEPARATE MAINTENANCE—REQUEST TO CHANGE PLEA FOR RELIEF—EVIDENCE—ENTERING FINAL DECREE OVER OBJECTION OF INNOCENT PARTY—No. 14274—*Decided October 3, 1938—Doty vs. Doty—District Court of Denver—Hon. George F. Dunklee, Judge—Affirmed—En Banc.*

FACTS: Wife brought suit for separate maintenance. Defendant filed cross-complaint for divorce. During course of trial, plaintiff amended her plea to one for divorce and alimony and jury returned a verdict in her favor. The Court entered Interlocutory Decree and awarded plaintiff the family home in satisfaction of all claims for alimony. Plaintiff offered proof of her present circumstances to support her plea for alimony, but the Court rejected the proffer. She objected to the signing of the Interlocutory Decree, saying that she had the right to again change her plea to the original one of separate maintenance. This objection was overruled and she moved to dismiss the entire action, which motion also was denied. The final decree of divorce was entered subsequently.

HELD: 1. Evidence leading to the awarding of equity in home in satisfaction of all claims for alimony examined and found to support award.

2. The trial Court is vested with some discretion in matters of the awarding of alimony and such discretion was not abused in the instant case.

3. It was not error for the trial Court to refuse plaintiff's request to again change her cause of action to one for separate maintenance.

4. When emotional instability is the only ground urged in support of plaintiff's motion to again change her cause of action, it is not sufficient reason for compelling trial Court to grant request.

5. While prior to 1933 a motion by the innocent party to dismiss the action for divorce might have been sustained although coming after the Interlocutory Decree was entered, such is not the case today.

6. In 1933, the General Assembly declared that public policy requires that the marital relation and the rights of parties to an action for divorce shall be finally determined within a reasonable time after trial, and that when the Interlocutory Decree is entered, the parties shall be divorced six months after the date thereof, and the same shall only be set aside for good cause shown after a hearing, and that such decree shall be a final order as of the date of its entry.

7. The general rule seems to be that a divorce decree will not set aside at the instance of the successful party.

8. Where it appears that the trial lasted four days, and the Court was fully advised as to the respective economic status of the par-

ties, the offer of proof as to plaintiff's needs at the time of the trial was not improperly rejected, for further testimony on that score would have been merely repetitions.

Opinion by Mr. Justice Bakke. Mr. Justice Hilliard, Mr. Justice Young and Mr. Justice Holland, dissent.

POLICE POWER—MUNICIPAL CORPORATIONS—MANDAMUS—EVIDENCE—No. 14276—*Decided August 31, 1938—Maurer vs. Boggs, Mayor, et al.—District Court of Logan County—Hon. Arlington Taylor, Judge—Reversed—In Department.*

FACTS: Plaintiff brought mandamus action to require City council of Sterling to issue a license to retail 3.2% beer. The City Council refused to issue license on ground that location of plaintiff's business place was on the fringe of the city and out of the regular business district and that made it too difficult to police the business and neighborhood with the city's small police force. The trial court refused the plaintiff relief.

HELD: 1. The action of a city council in refusing a permit to a citizen, otherwise fully qualified to sell 3.2% beer does not rise to the dignity of a policy of legal intendment to prohibit sale of such beer in such neighborhood to all persons for it had not "ordained" in statutory manner, and published to the world, that it elected to deny such privilege under its police power. There was nothing to keep the city from letting someone else have a license, or even letting the plaintiff have a license at a later date.

2. It was error for trial court to admit in evidence protests submitted to City Council against other applicants for such licenses, and an exhibit, containing uncomplimentary references to plaintiff where its signers only asked for an investigation, should have been excluded.

Opinion by Mr. Justice Hilliard. Mr. Justice Young, Mr. Justice Bakke, and Mr. Justice Knous concur.

WORKMEN'S COMPENSATION—No. 14397—*Decided September 19, 1938—Pryor Coal Mining Company et al. vs. Contino et al.—District Court of Denver—Hon. Otto Bock, Judge—Affirmed—In Department.*

HELD: "An injured workman is not to be denied a finding of total and permanent disability because not the victim of 'helpless paralysis reducing bodily functions to the minimum essential for the maintenance of a mere spark of life'. And though 'able to obtain occasional employment under rare conditions and at small remuneration'; * * * one may still 'be totally disabled for all practical purposes of competing for remunerative employment in any general field of human endeavor.' "

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke, Mr. Justice Hilliard, and Mr. Justice Holland concur.

CRIMINAL LAW — MURDER — ACCESSORY — EVIDENCE — INFORMATION—INSTRUCTIONS—No. 14335—*Decided September 19, 1938—Roberts vs. People—District Court, Weld County—Hon. Claude C. Coffin, Judge—Affirmed—En Banc.*

FACTS: R. and W. were separately tried for murder of B. Each was acquitted. After R's acquittal, but before W's acquittal, the district attorney charged R. with being an accessory after the fact to B's murder by W., but after W's acquittal amended the information charging the homicide to have been committed by a person or persons unknown; and W. was likewise charged as an accessory. R. was tried first and convicted. The case against W. was dismissed. R. assigns error.

HELD: 1. There was no material variance between the charge and the proof and the contention that R. was arraigned on one charge and convicted on another is not sound since the amendment enlarged the charge, making it broad enough to cover a murder by any person, but not eliminating W. as the perpetrator.

2. "Inability to prepare against or even being misled so that one does not prepare to defend against a specific charge is not prejudicial if that charge is not relied upon and withdrawn from the jury."

3. Evidence of defendant when on trial for murder considered and found to be sufficient, if believed by jury, to have sustained verdict of "guilty" on accessory charge since it showed that defendant had full knowledge that a crime had been committed and that he had helped to conceal it.

4. In Colorado, the conviction of the principal is not a condition precedent to the conviction of an accessory, although this may appear to be contrary to the common law.

5. The judgment in the principal felon's case, whether of conviction or acquittal, is not admissible for any purpose against the accessory.

6. It was not error for court to have admitted testimony of W. in presence of defendant R., that R. killed B., and that there was a third party present, for the court properly instructed jury that it must find beyond a reasonable doubt that the crime of murder was committed by some person "other than the defendant himself."

7. Exceptions going to the form of the information must be made before trial.

8. There is no compelling reason for holding that the information must state the means by which a concealment of a murder was committed, particularly when that question is not raised until after trial.

Opinion by Mr. Justice Young. Mr. Justice Hilliard and Mr. Justice Bouck dissent. Mr. Justice Holland not participating.

WILLS—CHARITABLE TRUSTS—INTERPRETATIONS OF CREATIVE PROVISIONS—No. 14374—*Decided October 3, 1938—In re: Estate of Chucovich vs. Jovanovich, etc.—County Court of Denver—Hon. C. E. Kettering, Judge—Affirmed—En Banc.*

FACTS: Plans for a hospital building on the grounds of Denver General Hospital, ornamentation, memorial, lobby, etc., were examined by County Court and it found that it "is a monument of permanent and ornamental nature * * * and within the terms of the will" which appointed trustee to spend not to exceed $100,000.00 as a memorial to former Mayor Speer, and to "construct and establish an ornamental fountain or gate or arch or other suitable monument of a permanent and ornamental nature, on or at an entrance to the Civic Center, or on or at an entrance to some other public park or public grounds in the City * * *". The Attorney General of Colorado assigned error.

HELD: 1. Where a trust of charitable nature is created in which the rights of heirs are not involved, such bequests are favored by the Courts and, in the interpretation of the creative provisions, the application of liberal rules may be indulged.

2. Where the doctrine of *ejusdem generis* is applied, it is generally used in connection with other important rules, not the least of which is a determination of the intent. In no event should the rule be applied within narrower confines than such intention which is to be gathered from the recognized meaning of the words employed.

3. Where the testator clearly states his desire that the monument be "a memorial in honor and memory of the late Mayor Robert W. Speer," and gives the trustee instructions to construct same saying, "an ornamental fountain or gate or arch or *other suitable monument of a permanent and ornamental nature,*" such a hospital fulfills the instructions.

Opinion by Mr. Justice Holland. Mr. Justice Bakke not participating.

TAXATION — CHARITABLE INSTITUTIONS — LABOR UNIONS — No. 14373—*Decided October 3, 1938—Lane, et al. vs. Wilson, etc.—District Court of Denver—Hon. Henry A. Hicks, Judge—Affirmed—En Banc.*

HELD: 1. Real Estate owned by a labor union and used exclusively in furtherance of its objects and purposes is not used for "strictly charitable purposes" within the meaning of Sec. 5 of Article X of Colorado Constitution and therefore, is subject to taxation.

2. An organization which is a "beneficial society whose beneficence is confined to the members, their families, dependents or friends, and depends upon the contributions made," not voluntarily given, but assessed against the members, is "not a charity, but a private institution for the mutual advantage of the members."

Opinion by Mr. Justice Bakke. Mr. Justice Hilliard and Mr. Justice Holland dissent.

ESTATES — ADMINISTRATOR — TRANSFER OF HEIR'S INTEREST — COMPROMISES—No. 14240—*Decided October 3, 1938—In re: Estate of Smith vs. Pueblo Savings and Trust Company—County Court of Pueblo County—Hon. Hubert Glover, Judge—Affirmed —In Department.*

HELD: 1. The Court will not undertake to cancel a deed to property in an estate from one heir to another in an action for accounting brought by the grantor against the administrator (bank) of the estate.

2. Nor will the title of the heir to said real estate be determined in this kind of an action.

3. Assuming that the Warranty Deed to plaintiff's brother did not cover the personal property, since he fails to show that he is entitled to it, he has no cause of action against the bank.

4. An heir may relinquish his rights by an express waiver or release or by estoppel, and as between the parties, the renunciation may be in any form which they adopt.

5. Compromises having for their object the settlement of family difficulties or controversies are favored at law and in equity if at all reasonable.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke, Mr. Justice Hilliard and Mr. Justice Holland, concur.
